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JUSTICE STORY ON THE COMMON LAW OF EVIDENCE

JOHN C. HOGAN*

In our system of jurisprudence it is the province of the jury to decide all matters of fact. The trial is held and the verdict of the jury is delivered in the presence of a judge who is bound to decide matters of law which arise in the course of the trial. Whenever a thing offered as proof is questioned as not proper to go before the jury as evidence, that question is to be resolved by the judge, and unless he permits it to be introduced as evidence at the trial, it can not legally come to the consideration of the jury. Whenever a thing is permitted by the judge to be brought before the jury, for the purpose of resolving a question of fact in dispute between the parties, that thing, in a legal sense, is called *evidence*. Whether there is *any evidence* of a fact is a question for the judge to decide, but whether the evidence is *sufficient* is a question for the jury to decide.

The common-law rules of evidence, recognized in England and the United States, are discussed in an unsigned article on that topic which appeared in the first edition of the *Encyclopedia Americana* (1829-1833).¹ The article was written by Supreme Court Justice Joseph Story.² Justice Story agreed to write several articles on legal subjects for the *Encyclopedia*, but requested that his identity be withheld until after they had appeared in print.³ The editors of the *Encyclopedia* complied with this request, and it was not until the final volume in the series was published in 1833 that Story's authorship of the articles was disclosed.⁴

Justice Story's anonymous contributions to the *Encyclopedia Americana* comprise more than one hundred and twenty pages, closely printed in double columns, and include articles on such topics as: "Common Law"; "Congress of the United States"; "Conquest"; "Contracts"; "Corpus Delicti"; "Courts of England and the United States"; "Criminal Law"; "Death Punishment"; "Domicil"; "Equity"; "Evidence"; "Jury"; "Lien"; "Law, Legislation and Codes"; "Natural Law"; "National Law"; "Prize"; and "Usury."⁵ All of these articles have been compiled from the *Encyclopedia*, and some of them have been found to contain material outside the scope of Story's best known writings.

The fact that Story prepared these articles for the *Encyclopedia*

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1. 5 ENCYC. AMERICANA, *Evidence* 6-14 (1st ed. 1831).

2. Cf. Hogan, *Joseph Story's Anonymous Law Articles*, 52 MICH. L. REV. 869-84 (1954).

3. LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 213 n.3 (3d rev. ed. 1880).

4. 13 ENCYC. AMERICANA 3-4 (1st ed. 1833).

5. Cf. 2 W. W. STORY, THE LIFE AND LETTERS OF JOSEPH STORY 27 (1851).

Americana seems to have been forgotten. Written during the formative period of Story's famous series of *Commentaries* on the law, the articles appeared in the *Encyclopedia* at about the time that the first volumes in this series were published. The *Commentaries on the Law of Bailments* was published in 1832, *Commentaries on the Constitution* in 1833, and *Commentaries on the Conflict of Laws* in 1834. Interest naturally centered upon the *Commentaries*, and the law articles, which were published anonymously, were simply forgotten.

The article on "Evidence" is reproduced below exactly as it was written by Justice Story in 1831 and published in the fifth volume of the *Encyclopedia Americana*.⁶

EVIDENCE

Evidence, in its most general sense, means the proofs which establish, or have a tendency to establish, any facts or conclusions. It may be divided into three sorts, mathematical, moral and legal. The first is employed in the demonstrations which belong to pure mathematics; the second is employed in the general affairs of life, and in those reasonings which are applied to convince the understanding, in cases not admitting of strict demonstration; the third is that which is employed in judicial tribunals for the purpose of deciding upon the rights and wrongs of litigant parties.

Probably in every system of jurisprudence aiming at exactness, some rules are introduced, and some restrictions are allowed, in respect to evidence, different from those which belong to mere moral reasoning upon probabilities. In our discussions on this head, we shall confine ourselves altogether to the consideration of evidence in a legal view, and principally with reference to the existing rules of the common law, recognized in England and America.

According to our system of jurisprudence in common law trials, it is the peculiar province of a jury to decide all matters of fact. The verdict of the jury is, however, to be given, and the trial is to be had, in the presence of a judge or judges, who preside at the trial, and are bound to decide matters of law, arising in the course of the trial. Whenever, therefore, a question arises, whether any thing offered as proof at such trial is or is not proper to go before the jury as evidence, that question is to be decided by the court, and, unless permitted by the

6. 5 ENCYC. AMERICANA, *Evidence* 6-14 (1st ed. 1831). [Mr. Hogan has paragraphed the original article and made other minor editorial changes. For recent publication of other Justice Story articles, see *Joseph Story's Essay on "Domicil"*, 25 B.U.L. REV. 216 (1955); *Joseph Story on Capital Punishment*, 43 CALIF. L. REV. 76 (1955); *Joseph Story's Encyclopedia Americana "Law Articles"*, 48 L. LIB. J. 117 (1955); *Joseph Story's Essay on "Natural Law"*, 35 ORE. L. REV. 88 (1955); *Three Essays on the Law by Justice Story*, 28 SO. CALIF. L. REV. 19 (1954); see, in general, Hogan, *Joseph Story's Anonymous Law Articles*, 52 MICH. L. REV. 869 (1954)—Ed. Note].

court, it can never legally come to the consideration of the jury. Hence, whatever is so permitted to be brought before the jury, for the purpose of enabling them to decide any matter of fact in dispute between the parties, is, in a legal sense, *evidence*, and is so called, in contradistinction to mere argument and comment.

This gives rise to a very important distinction, at the common law, as to the *competency* and the *credibility* of evidence. It is *competent*, when, by the principles of law, it is admissible to establish any fact, or has any tendency to prove it. It is *credible*, when, being introduced, it affords satisfactory proof of the fact. It follows, therefore, that evidence may be *competent* to be produced before a jury, when it may, nevertheless, not amount to *credible* proof, so as to satisfy the minds of the jury; and, on the other hand, it may be such, as, if before them, would satisfy their minds of the truth of the fact, but yet, by the rules of law, it is not admissible. Whether there is *any evidence* of a fact, is a question for the court; whether it is *sufficient*, is a question for the jury, when the cause is tried by a jury.

Evidence is, in its nature, divisible into two sorts: first, that which is *direct* and *positive* proof of any fact; and, secondly, that which is *presumptive* and *circumstantial*. It is again divisible, in respect to the mode or instruments of proof, into two sorts: first, *written* evidence; and, secondly, *unwritten* or *oral* evidence. We are accustomed to consider as *direct* and *positive* evidence, that which is proved by some writing containing a positive statement of the facts, and binding the party whom it affects; or that which is proved by some witness, who has, and avers himself to have, positive knowledge thereof, by means of his senses. Whenever the fact is not so directly and positively established, but is deduced from other facts in evidence, it is *presumptive* and *circumstantial* only.

Perhaps, in a strictly philosophical sense, much of the evidence usually denominated *positive* is but *presumptive*; for there is an admixture in it of some circumstances of presumption, though the presumption may usually be deemed irresistible proof. For instance, a promissory note is offered in evidence, as signed by the defendant; a witness, who attested it, swears to the execution and signature of the defendant. This is usually deemed positive proof; and yet it will be at once perceived, that it rests on the *credibility* of the witness, and the *presumption* that he has sworn what is true, which is a fact, that, in its nature, is not capable of absolute proof. But however this may be, in a practical sense, the distinction above stated is sufficiently intelligible and well-settled for all the purposes of human life.

As to Presumptive Evidence: It must be obvious that in a very great proportion of the questions of fact arising in the litigations before judicial tribunals, the proofs must be of a merely presumptive nature.

The want of written proofs; the death, or defect of memory, or treachery, of witnesses; the temptations to suppress evidence; the very nature of the transaction itself, founded in fraud, or in secret contrivances, or in personal confidence—all these, and many other considerations, require us to recur perpetually to presumptive evidence. And especially is this true in respect to public crimes; for these are rarely committed under such circumstances as lead to positive, unequivocal evidence of them.

All presumptions are necessarily founded upon the connection which human experience demonstrates usually to exist between a certain fact or circumstance, and other facts and circumstances. When the one occurs, the others are presumed to accompany them. Some presumptions of this nature are so strong and irresistible, that the law adopts them as *presumptiones juris et de jure*. Others, again, are left to be judged of according to the weight, which the court and jury may think them entitled to, taken in connection with all the other circumstances of the particular case.

There are other presumptions, or rather circumstances of presumption, which are so uncertain and unsatisfactory in their own nature, that the law rejects them, as unworthy of any credit, and too unsafe to found any judgment upon. And presumptions, favorable or unfavorable, often arise from the conduct, or motives, or want of motives, or character, or habits of a party, and may justly influence the decision of a case. But it would lead us too far to enter upon a full illustration of these remarks.

The common law has laid down many rules on the subject of presumptions, a few of which it may not be improper to enumerate. One is, that a man naturally intends the end and result, which must be the immediate consequence of his act. This is often applied to criminal cases. If a man strikes another with a dangerous weapon, and the effect of the blow would naturally produce death, he is deemed to intend to kill; and, under such circumstances, he will not be permitted to set up as a defense, that it was beside his intention. If a man strike another on the head with a heavy axe, so that his head is split open, and he instantly dies, the offender will not be permitted to excuse himself by pretending that he had no intention to kill. In our law, malice is a necessary ingredient in the crime of murder; and if a man kill another upon slight provocation, or use weapons, which are necessarily dangerous to life, or conduct himself in a very cruel and brutal manner, the presumption of the law is, that the act is malicious, and this presumption will prevail against any evidence of mere private intention to the contrary.

Another presumption of law is, that a man is innocent, until some proof is offered, that he is guilty of a crime. He is not bound, in the

first instance to show his innocence, for the law imputes no wrong to him without some proof. But as soon as such proof is offered against him, the presumptions disappears, and under particular circumstances, the burden of proof is on him to establish his innocence. For instance, if one man is proved to have killed another, the law presumes the act malicious, unless circumstances arising from the evidence produced against him repel that conclusion; and therefore he is required satisfactorily to establish all the circumstances of accident, necessity or infirmity, on which he relies for his defence.

These are instances in criminal cases. And there are many rules of presumption of a like nature in civil cases; some of which are conclusive, and others, again, which are liable to be rebutted by counter-evidence; some founded on natural reasoning, and others, again, upon artificial grounds. Among these are the following: Every person is presumed to have done an act, the omission of which would be criminal in him, until the contrary is shown. Fraud is not to be presumed. A party is to be presumed to continue in life until the contrary is made probable. Where the principal act or title is proved, all the collateral circumstances to give it effect will also be presumed. A debt will be presumed paid after a long, unexplained lapse of time. Some presumptions of this nature are artificial. Thus, in our law, a bond will be presumed to be wholly paid after 20 years, where there have been no intermediate payments or recognitions of the debt. A man will be presumed to be dead after an absence of 7 years, unexplained. An heir will be presumed to be in possession of land, of which his ancestor died seized. After 20 years enjoyment of an easement or servitude, a title will be presumed.

On the other hand, there are certain presumptions, which the law rejects (as has been already stated), because of their unsatisfactory nature and tendency. Thus, it is a general rule, that hearsay, or mere report and reputation of a fact, is not evidence, for this amounts to no more than the mere declarations of third persons, not under oath, and of facts of which they may have no certain knowledge. Our law generally requires, that every fact to be substantiated against a person, should be proved by the testimony of a witness (when it is to be proved orally), who is sworn to speak the truth; or, if it is dependent upon written evidence, it must be proved by evidence that is sanctioned by him, or by which he ought to be bound, as importing truth.

There are, however, some exceptions to this rule. Whenever the hearsay or declaration accompanies a fact, or, as it is often expressed, is a part of the *res gestae*, it may be evidence. So in cases of pedigrees, and of prescriptions, customs and boundaries, where, from the nature of the title, the facts are of great antiquity, or, ordinarily, other proofs could not be presumed to exist, hearsay or reputation is admitted as

evidence. A monument, or tomb-stone, or family Bible, stating a relationship, is, upon this ground, admitted as evidence of the relationship, as it would be of the death of a party. So declarations of parents, either written or oral, of the legitimacy and births of their children, especially if such declarations be before any litigation has arisen (*lis mota*), are admissible, after their decease, in proof of the fact. But it has been lately said, that such declarations, made *post litem motam*, are not admissible.

The admission of hearsay, too, is limited in extent, even in these classes of cases. It is admitted only to prove public or general rights, and matters of general reputation. But it is said to be inadmissible to prove mere private rights, or particular facts; as, for instance, upon a question of boundary, that a post was put down in a particular spot; or in a case of birth, that the birth was in a particular place; or that a party has a private right of way.

There are other cases, where the solemn declarations of parties, under whom the party to be affected by them claims, or with whom (as it is technically expressed) he is in *privity* of title, or estate, or blood, are good evidence; as, for example, the recital of a fact in a deed, under which the party claims title, binds him. So the testimony of a deceased witness, given upon a former trial, where the same point was in issue between the same parties. So dying declarations of a party, who has received a mortal wound, are evidence against the party accused of the crime. To go at large into this subject would require a treatise.

As to Oral or Unwritten Evidence: Having considered the nature and operation of presumptive evidence, we may now pass to a consideration of some of the rules of evidence, as to witnesses—when they are, and when they are not, competent to give testimony. In general, it may be said that all persons, not under any known disability, are competent witnesses.

Several grounds of incompetency exist, in the common law of England and America. The first is, want of reason or understanding. Persons insane, lunatics and idiots, are incompetent to be witnesses. But lunatics and persons temporarily insane, are, in their lucid intervals, or returns of reason, restored to their competency. A person deaf and dumb, if he has sufficient understanding, and can, by signs, make known his thoughts through an interpreter, or otherwise, is competent. But a person deaf, dumb and blind, would be deemed incompetent.

Children are admissible as witnesses as soon as they have a competent share of understanding, and know and feel the nature of an oath, and of the obligation to speak the truth. There can, therefore, scarcely be assigned any precise age fixed for the admission of them as witnesses. A child of five years of age is not necessarily incompetent, if he or she has sufficient reason, and a knowledge of the obligation and

nature of an oath; although, certainly, at such an age, there ought to be great hesitation in admitting or relying on such testimony, and it ought to have little weight, if uncorroborated by other proof. And the like circumstances would govern the case of persons, whose memory and understanding are greatly impaired by age. If they have too little mind to know the value of truth, or to understand or remember facts, they are incompetent. But if they are not thus deficient, they are admissible, and their credit is to be left to the jury.

A second ground of incompetency is the want of religious belief. The law, in order to justify the administration of an oath, or a solemn equivalent affirmation, requires that the party should believe, that it is obligatory upon his conscience, and that he becomes thus bound to tell the truth. But there is no certain sanction or obligatory force upon the conscience of a man, unless he believes, that his telling or not telling the truth, will, at all events, make him accountable to a Supreme Being for his conduct; and that, if he tells a falsehood, the Supreme Being will punish him accordingly.

It is not sufficient, by the common law, that a witness believes himself bound to speak the truth from a regard to his own character and the opinion of the public, or his own permanent interests, or the civil punishments annexed to perjury. Such motives (as has been justly said) have their influence, and may be brought in aid of religious obligation; but they do not supply its place. Indeed, they are of so uncertain a nature, so liable to be perverted to wrong purposes, so infirm in their operation, and so mixed up with other motives, of present reward, of future favor, of hatred, or kindness, or prejudice, that they do not afford a solid foundation upon which to rest our confidence. But if a man does believe in a superintending Providence, and in his responsibility to that Providence for all his conduct; if he feels that the eye of God can search his thoughts, and that he cannot escape his notice or his power, but will receive at his hands according to his deeds, there is a most solemn and affecting influence upon his mind. He may not always, with this belief, avoid falsehood; but he has the highest motives to do so.

Our law, therefore, requires that a person, to be a witness, should believe in the existence of a Supreme God, to whom he is accountable for his actions. The rule is usually laid down, in our books, with this addition—that he should also believe in a future state of rewards and punishments. And it has been accordingly held by some judges, that if he does not believe in a state of punishment, but only of reward, in a future world, he is not a competent witness, although he may believe in punishment in the present world, for all crimes, by the order of Providence. But this doctrine has been doubted and denied by other judges, who think, that if a witness believes in a God, and that He will

punish him in this world, if he swears falsely, he is admissible, notwithstanding he may not believe in a future state, or if he does believe in a future state, that he will be liable to any punishment in such state. This latter opinion was held by Lord Chief Justice Willes, in the case of *Omichund v. Barker*,⁷ and he is himself of very high authority. But upon such a question, where very able judges have differed, it becomes us to say no more than that the question may still be deemed unsettled.

It was formerly a rule, that infidels, or disbelievers in Christianity, such as Jews, Mohammedans, and the various kinds of heathen, were not competent witnesses. But that rule has been abrogated for a considerable length of time; and it now matters not whether a person be a Jew or a Christian, a Mohammedan or a Hindoo, if he believes in a God, and in his responsibility to Him for his conduct, and that he will be rewarded or punished according to his conduct, he is a competent witness. This has been firmly settled in our law, at least since the great case of *Omichund v. Barker*,⁸ in 1744-45. But atheists, and such infidels as profess no religion, or do not believe in any responsibility to any Supreme Being for their actions, are incompetent witnesses.

A third ground of incompetency is infamy of character. But this infamy is not that, which is morally attached to a man for his private profligacy and dissoluteness. That is not sufficient to exclude him as a witness, though it may go far to diminish his credibility. But the infamy, of which we speak, is that which results from a conviction of some crime deemed, in the law, infamous. It is not sufficient that a party has been convicted and punished for a crime; nor that the punishment itself is deemed by the public degrading and infamous. But the offence must, in its own nature, be infamous. All capital offences and felonies are deemed infamous; all offences importing fraud and gross moral depravity; every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, piracy, bribery, conspiracy to accuse another of a crime or to commit a fraud, swindling, cheating, grand larceny, and uttering counterfeit paper. Many other offences, though very reprehensible in law, as well as in morals, do not carry with them this disqualification; such as libels, riots, assaults and batteries, and other subordinate misdemeanors.

A pardon will, in cases where incompetency is thus a consequence of the conviction, restore the party to his competency, at whatever time it may be granted; and even though the party has suffered under it an infamous punishment. And it seems that our courts will not exclude a party as a witness upon a mere conviction of an infamous crime in another state or country, though it will form a strong objection to his credit. Accomplices in an infamous crime, who have not been convicted, but who confess their own guilt, are not on that account dis-

7. Willes 538, 125 Eng. Rep. 1310 (Ch. 1744).

8. *Ibid.*

abled from giving testimony; but of course it is received with great distrust and caution, and it rarely happens, that any conviction takes place upon such testimony standing alone and uncorroborated.

A fourth ground of incompetency is on account of interest. It is, in our law, a general rule, that all witnesses, interested in the event of a cause, that is, such persons as must gain or lose by the event, are incompetent to give testimony in favor of the party, to whom their interest inclines them, but not incompetent to give testimony for the other party. The interest, however, required to exclude a witness, must be a *legal* interest (that is, a fixed interest, which is recognised in our jurisprudence as such), and not merely a prejudice, affection or bias, or relationship, though these may go to his credit.

In respect to relationship, a husband and wife cannot be witnesses for or against each other. They cannot be witnesses for each other, because their interests are, in legal contemplation, one and the same; nor, generally, against each other, because it would destroy the necessary confidence between them, which the law deems of primary and fundamental importance to social life. But all other relations may be witnesses, for or against each other, such as father and child, master and servant, guardian and ward. But an attorney or counsellor cannot be a witness against his client as to any matter of fact, which he derived from his client in professional confidence. This proceeds upon a large ground of public policy. If the interest be strictly a legal interest, it is immaterial whether it is great or small. If it be not a legal interest, it matters not how strong the bias of the party may be, for that goes to his credit only. It is not sufficient, that he has an interest in the question, or has a case of a like nature; he must have an interest in the event of the cause, or it must be such that the verdict may be given in evidence, for or against him.

The interest, also, required to exclude a witness, must be a fixed, present interest, and not a remote, possible, or contingent interest. Whenever, therefore, the interest of the witness is doubtful, he is of course admitted. If a witness is really interested in the event of the suit, he is incompetent, although he supposes himself not to be. It would seem to follow, that if he believed himself interested, and he were, in fact, not so, he ought to be admitted as a witness. This is the English rule; but, in some of the American courts, it has been otherwise adjudged.

A mere honorary engagement will not exclude a witness. If the verdict or record would secure any advantage to the witness, or repel a charge against him, or a claim upon him, in a future proceeding, he is incompetent. A party to the record is generally incompetent. So a person liable to costs; so bail in a suit; so a servant, in an action against his master for negligence or misconduct of the servant; so a tenant, to

establish his landlord's title; so a devisee in a will, to prove the will; so a creditor, to increase the fund of a bankrupt's estate. These are merely put by way of example.

If a witness have an interest on both sides, so that, on the whole, he stands indifferent, he is admissible. So, although he is interested, if that interest is released or extinguished in any manner, his competency is restored. So where the witness offers to release his interest and the other party refuses. A member of a corporation is, generally, incompetent to testify in a suit, brought by the corporation. But this rule has been, in many of the American states, abolished by express legislation.

There are certain exceptions to the rule, as to the incompetency of witnesses an account of interest, which have been recognised in our law, and which seem justifiable by a moral necessity. Thus, agents, factors and servants are, generally, if not universally, admissible as witnesses for their principals, as to things within the scope of their agency. So persons entitled to a reward for conviction of other persons of a crime. So informers entitled to share in a penalty; but this is provided for by positive law. So a party robbed, in an action against the hundred for his loss; for otherwise he might not be able to prove the robbery, which is usually a secret thing. So in America the party, whose name is forged, on an indictment for forgery; but the rule is otherwise in England.

The rule of allowing interested testimony, *ex necessitate*, is to be understood not of necessity in the particular case, but of a general necessity in cases belonging to that class.

If a witness be not interested at the time when the fact occurred, he cannot, by creating a subsequent interest voluntarily on his own part, deprive the party of his testimony, as by making a bet, or wager on the event; but it is otherwise if the interest be created by act of law, or the act of the party by whom he is called.

This may suffice as a general outline of the law, as to incompetency on account of interest. And cases often arise on this subject, of extreme nicety and subtlety, where the application of the rule is full of doubt and difficulty. But the consideration of such points properly belongs to a full treatise on evidence.

In concluding this head, as to witnesses, we may avert to another exception, which has been extensively, but not universally, adopted in America. It is, that a party to *negotiable* paper shall not be allowed as a witness to prove its *original invalidity*, although he may be a witness to establish any subsequent fact. The same rule formerly prevailed in England; but it is now abrogated there.

In respect to oral or unwritten evidence, there are some other rules, which it may not be without use to state. And, first, as to *admissions*.

These, when made by the party himself, or by his agent in the particular transaction, are evidence against him, though not for him. If there are several persons having a joint interest, an admission of one of them in respect to the joint interest is evidence against all. So an admission of one partner, as to partnership transactions, is evidence against all the partners. But in cases of crimes and torts the rule is more limited. There, the admission of one defendant does not affect the others, unless it be a part of the *res gestae*; or there be proof of a common conspiracy or design, and the declarations of the party respect that design, and are a part of it, or are made in the course of executing it. But the admissions or declarations of an agent are not evidence against the principal, unless they are made in a case within the scope of his employment, or are a part of the *res gestae*. His admissions at another time, or in another employment, are not so. What he states while he is doing an act, as agent, is evidence; what he states historically, afterwards, as to the acts and proceedings under his agency, is not, because better proof may be obtained, for he may be called to appear personally as a witness.

There is a distinction in respect to the effect of admissions. In some cases, they are conclusive; in some, not. They are often conclusive, when the party has thereby induced another to act, or give credit. In many other cases they may be contradicted, where they do not operate as a fraud on other persons.

Secondly, in respect to *confessions*. The common law seems to have taken a distinction as to the effect of confessions in civil cases and in criminal cases. Generally speaking, they are evidence in civil cases as admissions. In criminal cases, a free, voluntary confession by a party, of his guilt, is also evidence, and is sufficient, *per se*, to found a conviction; but where a confession has been obtained by duress, or threats, or by a promise of pardon by an agent of the government or the prosecutor, and the promise is not complied with, the confession cannot be given in evidence. These cases seem clear. But where a party has made a confession by the advice of a friend, or upon the suggestion of a stranger, who had no authority to promise any indulgence or pardon, there seems some contrariety of opinion, whether such a confession is, or is not admissible as evidence.

However this may be (upon which it is unnecessary for us to express any opinion), it is certain, that any facts ascertained in consequence of any confession are, in all cases, evidence; as if a party confess, that he has stolen goods, and tells where they are hidden, and they are found, his statement, that they were there, would be evidence against him, coupled with the fact of finding them. And if a prisoner has been admitted as a witness for the government, and has confessed, and afterwards, upon the trial of his accomplices, he has refused to give

evidence, it has been decided, that, under such circumstances, he may be convicted upon his own confession.

Thirdly, as to the number of witnesses. Generally speaking, by the common law, the testimony of a single witness, if believed, is sufficient to establish any fact. There are, however, certain exceptions: First. On an indictment for perjury, the evidence of one witness is not sufficient to convict, for that would be only oath against oath. There must be either two witnesses, or strong independent evidence by circumstances, to corroborate the testimony of one. Secondly. In cases of treason, by statute, in England, there must be two witnesses to the *same overt* act of treason, or one witness to one, and another witness to another overt act of the same treason. By the constitution of the United States, no person can be convicted of treason unless on the testimony of two witnesses to the *same overt* act, or on confession in open court. In England, any confession would be sufficient, even when made out of court, if proved by two witnesses. But in regard to collateral facts, a single witness is sufficient, even in cases of treason. Thirdly. In courts of equity, the answer of the defendant (being under oath), as to facts which it positively and clearly denies, will prevail, unless disproved by two witnesses or one witness and corroborative circumstances. A single witness without such circumstances, is insufficient. In suits at law, the rule is otherwise; and a single witness here suffices in ordinary cases. The practice in courts of ecclesiastical jurisdiction is, in this respect, like that of the courts of equity.

In Respect to Written Evidence: This is divisible into various sorts: Statutes or acts of the legislature. These, if of a *public* nature, are evidence without any particular proof, for the judges are bound to take notice of them as the law of the land. They are deemed records, and of such a high nature, that they cannot be contradicted; for it is a general rule, that a record is conclusive proof, that the judgment or decision was made as is therein stated. But judicial tribunals will not take notice of *private* acts of the legislature; and therefore, unless made evidence by some special law, they are admissible in proof only by a properly authenticated copy. But when so proved, they, as matters of record, cannot be contradicted.

Judgments. Those of the superior courts of law are matters of record, and are also conclusive. Generally speaking, verdicts and judgments are evidence in cases between the parties to the suit and privies; but they are not evidence in cases between strangers. When the judgment is directly upon the point, it is a bar between the same parties, and their privies, and may be pleaded as an estoppel. And in cases, where it need not be so pleaded, it is, as evidence, conclusive between the same parties and their privies. But it is not evidence of any matter, which came collaterally in question in the suit, nor of

any matter incidentally cognizable, nor of any matter of inference from the judgment.

There are some exceptions to the general rule. *a.* The judgment in a suit between strangers is sometimes admissible, as the record of a judgment against a principal, who has been convicted of a felony, may be given in evidence against an accessory. *b.* Judgments of courts of a peculiar and exclusive jurisdiction are sometimes conclusive upon all persons. Thus judgments in rem, in cases of seizures by the exchequer and other courts having exclusive jurisdiction, are conclusive. So sentences of courts of admiralty in matters of prize, and in rem, at least as to the direct effect of such sentences in changing the property. So sentences of ecclesiastical courts in cases of which they have exclusive jurisdiction. *c.* Judgments in cases of *general rights*, as of a right of common, a public right of way, a custom, a pedigree, etc., are admissible as evidence of such right, custom, etc., in suit between third persons.

There are other judicial proceedings, which are not strictly matters of record, as decrees in chancery, and judgments in inferior courts, to which, however, the same general principles apply, as matters of evidence, as to judgments of record.

Depositions also, awards, and examinations by magistrates, are often evidence in cases between the same parties. There are also cases, in which public writings not judicial, such as journals of parliament, public gazettes, rate or tax books, ship's registers, rolls of manor courts, corporation books, and books of public entries, etc., etc., are evidence. But to go at large into the distinctions applicable to them would occupy too much space.

In Respect to Private Writings: The rules applied to oral testimony are generally applicable here. Such writings are evidence between parties and privies, but not between strangers, except under the limitations already stated. There are some few cases, in which the written statements of the party himself may be given in evidence, in his own favor, such as, for instance, his account books to verify charges made by him in respect to debts and charges, which are properly matters of account, such as debits and charges for goods sold, for labor and services, and for materials furnished.

But the most common question, that arises in respect to written instruments related to the mode of proving them to be genuine, or what they purport to be. When the original instrument is produced, if it is objected to, and there is a witness, who subscribed it, he must be called to prove the due execution of it by the party, whom it purports to bind. If the witness be dead, or out of the country, the handwriting of the witness must be proved by some person acquainted with it, and then it will be presumed, that the witness saw the due

execution of it; and it is evidence without further proof. If there is no witness who subscribed it, the handwriting of the party who executed it may be proved by some person who is acquainted with it. But it is not sufficient to prove it by comparison of the handwriting with the known handwriting of the party, though such evidence may be admitted in some cases as corroborative evidence. And it has been held, that in case of deeds, even the *admission* of the party, that it is his deed, or that he executed it, is not, at least where there is a subscribing witness, proof of the due execution of it.

If the instrument is lost, upon proof of the loss (and the party to whom it belongs may be sworn to prove the loss), the contents of it may be established by a copy or other proper proof. After an instrument has been executed thirty years, and any possession has followed, or right been exercised in conformity to it, it is admissible without any proof by witnesses.

In respect to *written* evidence, a question often occurs, how far *parol* (oral) evidence is admissible to control or affect it. There are two sorts of ambiguities affecting written instruments. One is called *latent* ambiguity, and the other *patent* ambiguity. The latter is such as appears upon the face of the instrument itself, from the doubtful nature of the terms used. The former is where the terms of the instrument are of themselves certain and free from doubt; but the ambiguity arises from some extrinsic matter or fact, collateral to the instrument. As, for instance, if *A* grant his manor in *B* to *C*; and he has two manors in *B*, the whole difficulty arises, not from the instrument itself, but from the extrinsic fact that he has two manors; for if he had but one, that would surely pass.

If *A* devise an estate to his nephew *B*, and he has no such nephew, but he has a nephew *C*, there is the same latent ambiguity. In each of these cases, and indeed in all cases of *latent* ambiguity, *parole* evidence is admissible to show what or who was intended; for as the difficulty arises from *parole* evidence, that may also be resorted to in order to remove it.

But in cases of *patent* ambiguity, it is otherwise. *Parole* evidence cannot be admitted to supply a meaning which the words do not, of themselves, import, or to give certainty, where the words are uncertain. Indeed, the general rule in our law is, that no *parole* evidence is admissible to vary, explain or control written instruments, to add new terms to them, or to limit or restrain the import of the words used in them. The ground of this rule is the general insecurity, which would arise from allowing the deliberate acts of parties in writing to be controlled by evidence so variable, and subject to so much doubt, as that is, which depends upon the recollection of witnesses. Written instruments are presumed to be prepared with caution

and deliberation, and to contain the best evidence of what the parties intend, and of all which they intend.

There are, however, some exceptions to the rule, founded on general convenience, which illustrate rather than weaken its original propriety. Parole evidence may be admitted to show fraud or illegality in an instrument. So to show, that a deed, though dated on one day, was actually delivered on another; for this does not vary its legal effect, but only shows, when it began to operate. So a custom may be shown, bearing upon the subject matter of a contract and creating an obligation, though not provided for in it, because contracts are presumed to be made with a tacit reference to the known customs of the place, and to include the customary obligations and rights, if there is nothing in the contract, which controls the operation of the custom. So the usages of trade are, for a like reason, admissible, not to supersede, but, in effect, to expound the real intention of the parties. So, in certain cases, courts of equity will allow parole evidence to establish a mistake in a written instrument; but this they do only upon the clearest proofs in an adverse case, where the mistake operates in fact as a fraud upon the party. So in relation to ancient instruments, such as charters, where there is some ambiguity in the words, a long course of practice under them is considered as good proof of the true original exposition of them; and parole evidence for this purpose is admissible; for though the words are now uncertain, they may have been certain in the age when they were used; and the parties, by their long acquiescence, and presumed to have put the proper construction on them. In all such cases it is the object of judicial tribunals, as far as they may, to uphold rather than defeat instruments.

There are, also, certain cases, in which express statute provisions exist, prohibiting any but written proofs of certain contracts. In our law, the principal statute on this subject is commonly called the *statute of frauds*, from its object being to suppress frauds. Among the contracts embraced in this statute are contracts for the sale of lands or interests in lands; contracts for the sale of goods above a certain value, as in England above £ 10; contracts to become answerable for the debt, default or miscarriage of another person; contracts to bind executors and administrators to answer damages out of their own estate; and contracts, which are not to be performed within the space of a year after they are made. Probably, in most countries, the civil policy has pointed out some express provisions of a like nature, by which a written contract is made indispensable to create a legal obligation.

We will close this outline of some of the leading principles of our law on this subject with an enumeration of a few rules, which did not properly fall under any former head:

1. On whom the burden of proof (*onus probandi*) lies. Generally it rests on the party, who alleges the affirmative of any proposition, to establish it by suitable proof. But sometimes even he, who alleges a negative, must prove it; as, in all cases where the party sets up a criminal neglect or omission, he must establish such neglect or omission by suitable proof; and it is not the duty of the party charged to establish his innocence, for the law will presume it in his favor, until there is some proof to the contrary.

2. The best evidence that the nature of the case admits, is to be produced. The meaning of this rule is not, that, in all cases, the highest possible evidence is to be adduced; but such evidence as presupposes that no better is behind, and in the power of the party. The evidence, for instance, of a written contract is the original instrument; and, therefore, a copy is not generally admissible. But if the original is proved to be lost, then a copy is evidence; for that is the next best proof. In such case, the copy must be proved to be such. Again, oral evidence will not be admitted if there is a copy in existence; but if there is no copy, then it is admissible. But where the best evidence is given, it is not necessary to fortify it by producing all that exists of the same kind. As if there be two witnesses to a deed, it is sufficient to prove it by one.

There are certain exceptions to this rule, founded on public considerations. As, for instance, the original of a public record need not be produced; but a copy is sufficient; for the public records ought, for general convenience and preservation, to remain always in one place. So public officers, acting under written commissions, need not show them; but their acting as officers publicly is evidence, *prima facie*, of their authority; for it would be criminal so to act without authority. So, where the fact lies more immediately in the power of the other party, or his acts conclude him—as if a person act as collector of taxes, or as a clergyman in orders—that is sufficient evidence for third persons to establish his official character.

3. Generally, facts only are evidence, and not the mere opinions of witnesses. But there are certain exceptions; as, in questions of science or trade, persons of skill may be asked their opinions. A physician may be asked if a particular wound or injury would, in his opinion, produce death; and a shipwright, his opinion as to the sea-worthiness of a ship.

4. The substance only of any particular point or issue of fact need be proved. This gives rise to a great variety of questions, as to the materiality or immateriality of particular circumstances, included in the point at issue; and upon these questions depends the doctrine of variance in our law. What variance is, or is not material, is often

matter of great nicety. There may be a variance in the proof of a date, or of some words of a contract, or of the time and place of making it, or, some of other circumstance. But a discussion of this subject cannot be had here without occupying too much space.

5. There are certain things, which courts and judges will judicially take notice of without any proof. They will take notice of all public and general laws; of all general customs of the realm; of the commencement and prorogation of the sessions of the legislature; of the king, president, governor, etc., of the state; of all the courts of general jurisdiction in the same state; of the general customs of merchants and trade; of the ordinary computations of time by the calendar; of the known civil divisions of the country into counties; of public holidays and festivals; of public proclamations, and other public documents of the executive and legislative departments; of the nations with which we are at peace or at war; of the nations and sovereigns acknowledged by our government; and of many other facts, which belong to the public proceedings and interests of the country. But of inferior courts of limited jurisdiction, not recognized in public statutes, of local customs and usages, of foreign laws, of peculiar tenures, and, in many instances, of local, geographical divisions, not necessarily involved in the discharge of public duties, judges and courts will not take notice.

We here finish our sketch, and refer the reader, for more full information on the common-law doctrine of evidence, to Peake on *Evidence*; Phillips on *Evidence*, and Starkie on *Evidence*, whose treatises are full of practical illustrations upon all the leading questions.

